

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

MAY - 7 2008

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	
Appellee,	)	2 CA-CR 2007-0300
	)	DEPARTMENT A
v.	)	
	)	<u>MEMORANDUM DECISION</u>
	)	Not for Publication
MICHELLE RENEE LOPER,	)	Rule 111, Rules of
	)	the Supreme Court
Appellant.	)	
	)	

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APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20054253

Honorable Barbara Sattler, Judge Pro Tempore

AFFIRMED

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Terry Goddard, Arizona Attorney General  
By Randall M. Howe and Laura P. Chiasson

Tucson  
Attorneys for Appellee

John William Lovell

Tucson  
Attorney for Appellant

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H O W A R D, Presiding Judge.

¶1 After a jury trial, appellant Michelle Loper was convicted of one count of possession of the dangerous drug methamphetamine and one count of possession of drug

paraphernalia, based on a plastic bag and pill bottle in which the methamphetamine was stored. The trial court suspended imposition of sentence and ordered Loper to be placed on probation for eighteen months. On appeal, Loper claims fundamental error occurred when the state questioned her at trial about her oxycodone, which was in the same pill bottle. Finding no fundamental error, we affirm.

¶2 When a defendant fails to object at trial to the introduction of evidence, we review solely for fundamental error. *See State v. Marlow*, 163 Ariz. 65, 69, 786 P.2d 395, 399 (1989); *see also State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). Fundamental error is “rare” and is “error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.” *Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607, *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984); *see also State v. Morris*, 215 Ariz. 324, ¶ 59, 160 P.3d 203, 216 (2007). The defendant has the burden to prove error, that the error was fundamental, and finally that the error caused prejudice. *Henderson*, 210 Ariz. 561, ¶¶ 19, 23-24, 26, 115 P.3d at 607-08.

¶3 In this case, Loper claims the state’s elicitation of evidence regarding her oxycodone use was irrelevant, that its admission constituted error, and that it violated a pretrial stipulation between the parties. But the pretrial stipulation merely prohibited the use of the name of the pain medication that was found in the pill bottle, not any mention that Loper took the medication. And the evidence concerning when she took the pain medication was relevant to rebut her claim that she had not opened the bottle in almost a

month and was therefore unaware it also contained methamphetamine. The issue therefore is whether the prosecutor's use of the name oxycodone constituted fundamental error.

¶4 Even if the prosecutor erred or violated the stipulation by identifying the pills as oxycodone rather than as pain medication, Loper does not provide any analysis or authority to support her claim that such error was fundamental. Loper had two different kinds of medication in the bottle. She admits she had testified without prompting that the other pills in the bottle contained morphine. Loper does not argue, nor does the record show, that the use of the name oxycodone denied her a fair trial or that it deprived her of a right essential to her defense. *See Morris*, 215 Ariz. 324, ¶ 60, 160 P.3d at 217. And even if we consider Loper's prejudice argument in determining whether the error was fundamental, her assertion that the jury drew an unfavorable impression from the oxycodone evidence is highly speculative. Consequently, Loper has failed to carry her burden of showing fundamental error.

¶5 We therefore affirm Loper's convictions and the probation order.

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JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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J. WILLIAM BRAMMER, JR., Judge